

## **REMARKS**

Applicant's thank the examiner for his time to discuss this case. Reconsideration and withdrawal of the examiner's rejections under 35 USC §§ 102 and 112 are respectfully requested in view of the above amendments, the following remarks and the declaration under Rule 1.132 submitted herewith.

### ***Claim Objections***

The examiner has objected to claim 21 because of the following asserted informalities: In instant claim 21, the terms "polymers" appears twice in the Markush listing (see lines 2 and 6 of instant claim 21). One occurrence of the term "polymers" should be deleted from instant claim 21. Appropriate correction is required. In response, applicants have amended claim 21 according to the examiner's kind suggestion.

### ***35 USC § 112***

The examiner has rejected claim 27 under 35 U.S.C. 112, second paragraph, as being assertedly indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

The examiner asserts that claim 27 contains the trademarks/trade names "Merquat 100 or 2200", "Jaguar C17 or C13S", "Salcare Supre 7, SC10 or SC30", Gafquat HS100 or 755", and "Luviquat FC370, FC550, HM552 or FC905". Where a trademark or trade name is used in a claim as a limitation to identify or describe a particular material or product, the claim does not comply with the requirements of 35 U.S.C. 112, second paragraph. See *Ex parte Simpson*, 218 USPQ 1020 (Bd. App. 1982). In response, applicants have amended claim 27 to substitute the generic names of the products as disclosed in the specification on pages 21 to 22.

**35 USC § 102**

The examiner has rejected claims 1-29 under 35 U.S.C. 102(b) as being anticipated by Hitchen, EP 463,780. The examiner asserts the following:

Hitchen, EP 463,780, discloses an aqueous shampoo composition comprising 2-40% by weight of surfactants, such as anionic and amphoteric surfactants (see page 2, line 43; page 3, line 13), 0.01-10% by weight of a silicone (see page 3, lines 15-42), 0.1-5% by weight of a suspending polymer, such as an acrylic acid polymer (see page 3, line 44; page 4, line 1), 0.01-5% by weight of a titanium dioxide coated mica having a particle size of 2-150 micrometers (see page 4, lines 4-35), 0.01-5% by weight of a cationic conditioning agent, such as Merquat 100 (see page 4, line 36; page 5, line 9), and additional ingredients, such as pearlescers and additional thickeners (see page 5, lines 10-31), per the requirements of the instant invention. Specifically, note Examples 1-11. The examiner asserts that the compositions disclosed in Hitchen, EP 463,780, would inherently meet the optical property, reflectivity change, opacity change, particle size and viscosity requirements of the instant invention, since the compositions disclosed in Hitchen, EP 463,780, contain all of the components in the amounts required in the instant claims, absent a showing otherwise. Therefore, instant claims 1-29 are anticipated by Hitchen, EP 463,780. Applicants respectfully traverse this rejection.

In response to the examiner's assertion that the compositions disclosed in Hitchen would inherently meet various optical property and skin appearance changes, two representative examples disclosed in Hitchen were reproduced as described in the Declaration submitted herewith. It was found that the Hitchen samples did not show the

claimed change in skin appearance and therefore Hitchen cannot inherently anticipate the instant claims.

The examiner has rejected claims 1-29 under 35 U.S.C. 102(e) as being anticipated by Shana'a, et al., U.S. Patent No. 6,737,394. The examiner asserts the following:

Shana'a, et al., U.S. Patent No. 6,737,394, discloses an aqueous isotropic cleansing composition for cleaning the human body (see abstract and col. 1, lines 7-10) comprising surfactants, such as anionic and amphoteric surfactants (see col. 2, lines 7-10) a thickening agent, such as hydrophobically modified, crosslinked polyacrylates (see col. 9, line 44; col. 10, line 21), 0.1-25% by weight or organogel particle (see col. 4, lines 13-21), and additional components, such as emollients, structurants, and cationic conditioning agents (see col. 4, line 31; col. 10, line 67), per the requirements of the instant invention. It is further taught by Shana'a, et al., that the viscosity of the isotropic liquid is 1,000-300,000 cps@ 1/sec shear rate at 25 degrees Celsius (see col. 2, lines 52-57). Specifically, note the Examples in Table 2. The examiner asserts that the compositions disclosed in Shana'a, et al., would inherently meet the optical property, reflectively change, opacity change, and particle size requirements of the instant invention, since the compositions disclosed Shana'a, et al., contain all of the components in the amounts required in the instant claims, absent a showing otherwise. Therefore, instant claims 1-29 are anticipated by Shana'a, et al., U.S. Patent No. 6,737,394. In response, applicants have amended independent claim 1 to recite a minimum concentration of solid particulate optical modifiers in excess of the maximum disclosed in Shana'a, et al., so as to clearly distinguish the instant claims from Shana'a, et al.

Shana'a, et al., specifically disclose cleansing compositions that contain 1 to 2% by wt. of organogel particles (see examples I to IV in Col. 21 and 22). These particles are gels and are not solid particles (see Shana'a Col. 13, lines 35-40) as claimed in the instant case, but the gel particles may however contain solid pigments at a level up to 0.5% solid pigment (see Shana'a, et al., Table 3, Sample C in Col. 23). The maximum solid particulate concentration of any example in Shana'a, et al., would therefore be 0.001% by wt., i.e., the product of 2% organogel content and 0.5% solid pigment in the organogel particle. Claim 1 as now amended substantially exceeds the solid particulate level of Shana'a, et al.'s examples.

### ***Double Patenting***

The examiner has rejected claims 1-29 on the ground on nonstatutory obviousness-type double patenting as being unpatentable over claims 1-28 of U.S. Patent No. 6,906,015, asserting that although the conflicting claims are not identical, they are not patentably distinct from each other because U.S. Patent No. 6,906,015 claims a similar ordered liquid cleansing composition for hair and skin comprising 3-30% by weight of a surfactant system, 0.1-15% by weight of a structurant, 0.1-10% by weight of a cationic polymer, a solid particulate optical modifier, and adjunct ingredients, wherein the composition has a viscosity of 40,000-300,000 cps at 25 degrees Celsius and meets a specific set of optical properties on the skin (see claims 1-28 of U.S. Patent No. 6,906,015), per the requirements of the instant claims. Therefore, instant claims 1-29 are an obvious formulation in view of claims 1-28 of U.S. Patent No. 6,906,015. In response, applicants submit herewith a Terminal Disclaimer for US 6,906,015.

The examiner has provisionally rejected claims 1-29 on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-28 of copending Application No. 11/071,014, asserting that although the conflicting claims are not identical, they are not patentably distinct from each other because copending Application No. 11/071,014 claims a similar ordered liquid cleansing composition for hair and skin comprising 3-30% by weight of a surfactant system, 0.1-15% by weight of a structurant, 0.1-10% by weight of a cationic polymer, a solid particulate optical modifier, and adjunct ingredients, wherein the composition has a viscosity of 40,000-300,000 cps at 25 degrees Celsius and meets a specific set of optical properties on the skin (see claims 1-28 of copending Application No. 11/071,014), per the requirements of instant claims. Therefore, instant claims 1-29 are an obvious formulation in view of claims 1-28 of copending Application No. 11/071,014.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

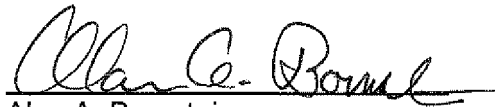
In response, Applicant's respectfully assert that if the "provisional" double patenting rejection becomes the only rejection remaining in the application, the Examiner is respectfully requested to withdraw the rejection allowing the instant case to issue thereby converting the provisional double patenting rejection to a double patenting rejection for Application No. 11/071,014. MPEP 804 (I)(B), 8<sup>th</sup> edition revision – 3 October 2005.

### **CONCLUSION**

In summary, claims 1, 21 and 27 have been amended. No new matter has been added by way of this amendment.

In light of the above amendments and remarks, applicants submit that all claims now pending in the present application are in condition for allowance. Reconsideration and allowance of the application is respectfully requested. The examiner is invited to contact the undersigned if there are any questions concerning the case.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Alan A. Bornstein", written over a horizontal line.

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